No. 9918

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC GAS AND ELECTRIC COMPANY,
a corporation,

Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

Upon Petition To Review An Order of The Securities and Exchange Commission

---

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 9918

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION TO REVIEW AND MODIFY OR SET ASIDE AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION, AND FOR A STAY PENDING SUCH REVIEW

To the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit:

Pacific Gas and Electric Company petitions the Court to Review and Modify or Set Aside so much of the Order of the Securities and Exchange Commission made September 10, 1941, as denies the application of the Petitioner for an order under Section 2(a) (8) of the Public Utility Holding Company Act of 1935, declaring it not to be a subsidiary of The North American Company, and for a Stay Pending Such Review, and in that behalf alleges:

1. Petitioner is a corporation organized and existing under the laws of California, having its principal place of business in San Francisco, California, in the Ninth Judicial Circuit of the United

States. Petitioner is a public utility engaged in the business of producing, generating, purchasing, transmitting, distributing, and selling electric energy and gas to the public. All of Petitioner's public utility business is conducted, and all of its properties used or useful in conducting that business, are located within the State of California.

2. The Securities and Exchange Commission (hereinafter called the "Commission") was established under Section 4, Title I of the Securities Exchange Act of 1934, approved June 6, 1934, and is charged with the administration of the Public Utility Holding Company Act of 1935, approved August 26, 1935, (49 Stat. 803, 15 U.S.C.A. Sec. 79 et seq., hereinafter called the "Act").

3. Upon information and belief The North American Company now is, and for a long time past has been, a registered holding company under the Act. At all times since June 12, 1930, it has continued to own more than 10 per centum of the outstanding voting securities of Petitioner, to wit, approximately 17.71% of Petitioner's outstanding shares of stock.

4. Petitioner seeks the review of an Order of the Commission dated September 10, 1941, entered in a proceeding before it upon application of petitioner under Section 2(a) (8) of the Act for an order declaring that Petitioner is not a subsidiary company of The North American Company, in so far as said Order denies said application. A copy of said Order is hereto attached and marked Exhibit A. A copy of the Findings and Opinion of

the Commission issued in connection with said Order is hereto attached and marked Exhibit B.

5. Jurisdiction of this Court is invoked under Section 24(a) of the Act, which provides that any party aggrieved by an order issued by the Commission under said Act may obtain a review of such order in—*inter alia,* the Circuit Court of Appeals of the United States within any circuit wherein such person has his principal place of business.

6. The Act provides for registration of holding companies and for extensive regulatory control by the Commission of registered holding companies and their subsidiary companies; it includes within its definition of a subsidiary company, any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned by a holding company, but provides that (15 U.S.C.A. Sec. 79b (a) (8)):

> "The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A), if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons), either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a con-

trolling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice, and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii) and (iii) are satisfied during the period for which such order is ef-

fective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term 'applicant' means only the company in respect of which the order is to be entered."

The obligations, duties and liabilities imposed in the Act upon subsidiaries of registered holding companies are onerous and extensive and the penalties for violation thereof are severe.

7. On November 29, 1935, Petitioner in good faith filed with the Commission an application for an order declaring that it is not a subsidiary company of The North American Company.

On September 4, 1940, the Commission directed a hearing upon such application, and on October 10, 1940, directed that such hearing commence at San Francisco, California, on November 12, 1940. Such

hearing was commenced at San Francisco on November 12, 1940, and continued there, and later in New York City, New York, being concluded on January 16, 1941.

Petitioner duly requested that the Trial Examiner make a report and findings of fact. The Trial Examiner on April 22, 1941, filed his Report and Findings of Fact with the Commission (a copy of which is hereto attached and marked Exhibit C), recommending that Petitioner's application be granted. In said report and findings of fact the Examiner recommended that, considering all facts of record, the Commission should find:

> "That the North American Company does not have the power to control the Pacific Gas and Electric Company;
>
> That the Pacific Gas and Electric Company has never been and is not now controlled, directly or indirectly, by the North American Company;
>
> That the management and policies of the Pacific Gas and Electric Company are not subject to the controlling influence, directly or indirectly, of the North American Company, wherefore it is not necessary or appropriate in the public interest and for the protection of investors or consumers, that the Pacific Gas and Electric Company be subject to obligations, duties and liabilities imposed by The Public Utility Holding Company Act of 1935." (Exhibit C, finding 181).

Counsel for the Commission duly filed exceptions to said report and findings of fact; Petitioner and counsel for the Commission filed briefs, and the matter was argued before three of the Commissioners on July 21, 1941.

On September 15, 1941, Petitioner received by registered mail a copy of the Order of the Commission of September 10, 1941, together with copies of the "Findings and Opinion of the Commission" in said matter, also dated September 10, 1941.

8. At the hearing before the Trial Examiner, Petitioner introduced sworn testimony and evidence in support of its application, and in proof of the facts required to be found by the Commission as a basis for the order sought. The taking of testimony before said Trial Examiner required twelve days, ten in San Francisco, California, and two in New York City, New York. Nineteen witnesses, including all of the principal officers and all of the Directors of Petitioner, appeared and testified under oath, and were extensively cross-examined by counsel for the Commission. Petitioner introduced in evidence 53 exhibits. The Commission introduced in evidence 141 exhibits, which included all written instruments considered by counsel for the Commission to be material to the inquiry and which had been found in an examination by the Commission of the files of Petitioner and The North American Company. The transcript of testimony includes 1685 pages. Three of the witnesses were produced at the request of counsel for the Commission.

At said hearing the Railroad Commission of the State of California appeared at the invitation of said Commission and filed a statement, which statement included the following:

> "Our object in presenting these observations, as stated at the outset, has been merely to summarize the authority exercised by this state regulatory Commission. They are not presented either to support or controvert the facts alleged in the application herein of Pacific Gas and Electric Company praying for an order of your Honorable Commission declaring it not to be a subsidiary of North American Company. Yet, as also stated in the beginning, we are aware of no instance during the course of this Commission's regulation of Pacific Gas and Electric Company when its management or policies appear to have been either controlled or influenced by North American Company. We may add that we perceive no public interest existing within the State of California, either for the protection of investors or consumers, which compels the conclusion that applicant, Pacific Gas and Electric Company, should be declared subject to the obligations and duties imposed by the federal Holding Company Act upon subsidiary utility corporations." (Exhibit C, finding 170)

In its briefs and argument, Petitioner specified the findings of fact and conclusions of law to which

it believed it was entitled by the evidence and by the proper construction of the Act.

The objections to the Order of the Commission hereinafter set forth, and the points hereinafter specified upon which Petitioner intends to rely, were all duly urged before the Commission.

In its application, Petitioner, in accordance with the rules of the Commission, reserved and refused to waive any constitutional or legal rights and protested that said Act if and to the extent that its provisions may be applicable to Petitioner, is repugnant to the Constitution of the United States, and that Petitioner is not subject to any of the provisions of said Act, nor to any rule or regulation adopted by the Commission under its authority.

9. In its Findings and Opinion (Exhibit B) the Commission found that all of Petitioner's public utility properties are located in California; that Petitioner does not purchase or sell any gas or electricity outside of California or at the state line; that Petitioner, and all of its subsidiary companies are predominantly intrastate in character and carry on their business in California, the state in which each of them is organized; and that Petitioner is predominantly a public utility company whose operations as such do not extend beyond the State of California. The Commission further found that Petitioner was not an intermediary company through which control of another company is exercised; and that the issues before it under Section 2(a) (8) of the Act were whether Petitioner had shown (a) that it is not controlled, directly or in-

directly, by The North American Company by any means or device whatsoever, and (b) that its management or policies are not subject to a controlling influence, directly or indirectly, by The North American Company so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that it be subject to the obligations, duties and liabilities imposed by the Act upon subsidiary companies of holding companies.

The Commission further found "There is almost no dispute as to the facts in the case as they are set forth in the trial examiner's report and in the briefs of both counsel. The point at issue with respect to the application under Section 2(a) (8) is rather one of statutory interpretation, and in this respect we cannot agree with the conclusions reached by the trial examiner."

It further stated "We agree with the finding of the trial examiner that the record does not reveal any past attempts by North American to interfere affirmatively with the management or policies of PG&E. But we also think that it is clear that the reason for this non-interference has been North American's complete satisfaction with the local management and that its failure to interfere has been purposeful."

The Commission also held "But our decision herein is based primarily on our finding that North American has the power—if the occasion arises and if it so desires—to make its influence felt in a substantial and affirmative manner."

Following its finding that The North American Company has the power to make its influence felt, and following a recital of certain matters wherein The North American Company, by reason of its large stockholding, might exert influence with respect to Petitioner's activities, the Commission declared:

> "The only question remaining is whether North American's influence in applicant's affairs is such 'as to make it necessary or appropriate in the public interest or for the protection of investors or consumers' that applicant be subject to the obligations, duties, and liabilities imposed by the Act on subsidiary companies of holding companies. Applicant is a company with stated assets of almost $800,000,000 serving in excess of 1,500,000 customers; its securities are listed and traded on national securities exchanges and are owned by investors throughout the country."

The Commission did not find that any of the evils recited in Section 1 of the Act as reasons justifying its enactment, exist in the present case.

The Commission concluded its Findings and Opinion with the following statement:

> "On the basis of the foregoing, we hold that applicant has not demonstrated that its management and policies are not subject to the controlling influence of North American, so as to make it necessary or appropriate in the public interest or for the protection of investors or

consumers that the applicant be subject to the obligations, duties, and liabilities imposed by the Act upon subsidiary companies of holding companies.

We desire to emphasize that our holding in this respect is not to be taken to mean that any stigma is cast upon applicant or that we think that applicant is not properly regarded as a California corporation. Nor do we mean to indicate that the influence of North American necessarily is or will be improperly exercised. The only question which we have decided is that, in the circumstance of this case where the statute presumptively requires that PG&E be regulated as a subsidiary of North American, the facts in the record before us do not demonstrate that PG&E is entitled to be excepted from the general requirement of regulation as a subsidiary of a registered holding company."

10. Petitioner alleges that the Order to be reviewed hereunder is invalid and void and should be set aside in so far as it denies Petitioner's application, for the reasons that:

a. The Commission erred in failing to find that Petitioner is not controlled by The North American Company.

b. The Commission erred in failing to find that the management and policies of Petitioner are not subject to a controlling influence by The North American Company.

c. The Commission erred in failing to find that

the management and policies of Petitioner are not subject to a controlling influence by The North American Company so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that Petitioner be subject to the obligations, duties, and liabilities imposed in the Act upon subsidiary companies of holding companies.

d. The Findings and Opinion of the Commission do not justify its failure and refusal to make the findings specified in the foregoing subdivisions (a), (b) and (c).

e. The Commission erred in failing to find affirmatively that Petitioner is an independent company; that it is not controlled by The North American Company; and that its management and policies are free from the controlling influence of The North American Company.

f. The Commission erred in taking jurisdiction over Petitioner without any finding of facts on which such assertion of jurisdiction is based, and it therefore acted without due process of law and in contravention of the Fifth Amendment of the Constitution of the United States.

g. The Commission erred in taking jurisdiction over assets of Petitioner located, and business and affairs of Petitioner conducted, wholly within the State of California, in contravention of the Tenth Amendment of the Constitution of the United States.

h. The Commission erred in its interpretation

and application of the Act, and in its conclusions, in the following respects:

(1) The Commission construed the Act as imposing upon Petitioner the duty of demonstrating that it is not controlled by The North American Company, and that its management and policies are not subject to the controlling influence, directly or indirectly, of The North American Company so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that Petitioner be subject to the obligations, duties and liabilities imposed in the Act upon subsidiary companies of holding companies, and refused to consider or pass upon the evidence produced in said proceeding before the Commission in accordance with the provisions of the Act.

(2) The Commission ignored and failed to give weight and effect to uncontradicted evidence that Petitioner is not in fact controlled by The North American Company and that its management and policies are not subject to the controlling influence, directly or indirectly, of The North American Company so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that Petitioner be subject to the obligations, duties and liabilities imposed in the Act upon subsidiary companies of holding companies, and refused to consider or pass upon the evidence produced in said proceeding before the Commission in accordance with the provisions of the Act.

(3) It disregarded the word "controlling" in

construing and applying clause (iii) of Section 2(a) (8) of the Act.

(4) It construed and applied the words "subject to a controlling influence" in said clause as meaning "susceptibility to domination".

(5) It held that the ability "to make its influence felt in a substantial and affirmative manner" by The North American Company amounted to a controlling influence under the Act.

(6) It held that the fact that The North American Company might make a "formidable opponent" in a proxy fight, and that "there is a strong possibility that North American could prevail", (as found by the Commission, but which as hereinafter set forth is contrary to the uncontradicted evidence) thus making it a "potent tool in influencing the management to give heed to North American's wishes" amounted to a controlling influence within the meaning of the Act.

(7) It held in substance that a mere possibility of succeeding in a future proxy fight constituted a controlling influence within the meaning of the Act.

(8) It held that a future possibility of control under speculative future circumstances constituted a controlling influence within the meaning of the Act.

(9) It decided that an intrastate public utility company may be found to be subject to a "controlling influence" by another company within the meaning of said Act, without proof that the influence presently exists or is sufficiently effective to be controlling.

(10) It construed and applied the Act as bringing an intrastate utility company within the regulatory provisions of the Act, as a subsidiary of a holding company, if it is hypothetically susceptible to future influence by the holding company, without proof that such influence is presently existing, or is strong enough, if exerted, to be controlling.

(11) It disregarded competent, relevant and material evidence which is uncontradicted and substantial and is adequate proof of the fact, that Petitioner is neither controlled by, nor subject to a controlling influence by, The North American Company so as to make it necessary or appropriate that it be regulated under the Act, and concluded that it may instead, deny the application by a series of conjectures unsupported by substantial evidence.

(12) The Commission construed and applied the Act as giving it uncontrolled discretion in determining whether it was necessary or appropriate in the public interest or for the protection of investors or consumers, that Petitioner be subject to the obligations, duties and liabilities imposed by the Act upon subsidiary companies of holding companies; and disregarded conclusive proof not only that none of the evils enumerated in the Act existed in the past, or exist at present, but also that any power or influence of The North American Company is not sufficient to bring about any of such evils.

(13) The Commission failed to apply or give effect to the provisions of the Act that where it is shown that a controlling influence does not presently exist, but may come into existence at some future

date, the application for an order declaring that Petitioner is not a subsidiary within the meaning of the Act, shall not be denied, but shall be granted conditionally on terms as authorized in Section 2(a) (8) of the Act.

(14) In holding that Petitioner "has not demonstrated that its management and affairs are not subject to the controlling influence of North American", the Commission held Petitioner to an impossible standard of proof of a negative fact and required such a degree of proof as produces absolute certainty.

(15) The Commission has construed the phrase "subject to a controlling influence" in clause (iii) of Section 2(a) (8) of the Act in such a manner as to render it so uncertain and vague as to be incapable of judicial enforcement.

(16) The Commission construed and applied the Act as giving it unlimited discretion in determining what degree of influence over Petitioner's management and policies shown to be possessed by North American constitutes a "controlling influence" which is such "as to make it necessary or appropriate in the public interest, or for the protection of investors or consumers" that Petitioner be subject to the obligations, duties and liabilities imposed by the Act on subsidiary companies of holding companies. As so construed the Act is void for uncertainty and constitutes an unconstitutional delegation of legislative power. The proper construction of the Act is that any influence shown to be possessed by a holding company over the affairs of an intrastate

public utility, must presently exist and must be sufficiently extensive and powerful to bring about the evils that the Act is designed to guard against and which are enumerated in it.

(17) The evidence shows conclusively that the evils which the Act was designed to prevent have not existed and do not at this time exist with respect to Petitioned, and that The North American Company never has possessed, and does not now possess sufficient influence to bring about such evils in the future. The Trial Examiner found as follows:

> "171. Present and prospective investors in Applicant's securities can obtain the information necessary to appraise the financial condition and earning power of applicant.
>
> 172. Applicant now keeps and ever since 1913 has kept its accounts in accordance with the uniform system of accounts for gas and electric corporations prescribed from time to time by the California Railroad Commission.
>
> 173. All reports filed pursuant to the uniform system of accounts are open to the public.
>
> 174. Applicant issues a comprehensive annual report containing a balance sheet and profit and loss statement, a copy of which is sent to each stockholder.
>
> 175. Applicant's common stock is listed on the New York Stock Exchange, and its common and preferred stocks are listed on the San Francisco and Los Angeles Stock Exchanges, and in that connection it files with such Exchanges and the Securities and Exchange Com-

mission all reports required by such Exchanges and by the Securities Exchange Act.

176. It has issued bonds on several occassions since the enactment of the Securities Act in 1933, and in that connection has filed the registration statements required by that Act." (Exhibit C)

The Commission disregarded these findings, and the uncontradicted evidence which supports them, and erroneously concluded that Petitioner should be made subject to the obligations, duties and liabilities imposed by the Act on subsidiary companies of holding companies, because Petitioner "has not demonstrated that its management and policies are not subject to the controlling influence of North American so as to make it necessary or appropriate in the public interest or for the protection of investors and consumers" that Petitioner be subject to the obligations, duties and liabilities imposed by the Act upon subsidiary companies of holding companies.

i The Commission erred in finding without substantial evidence in support thereof, and contrary to substantial and uncontradicted evidence to the contrary, the following as facts:

(1) That "North American has the power—if the occasion arises and if it so desires—to make its influence felt in a substantial and affirmative manner".

(2) That "North American's holdings would make it a formidable opponent. And the mere fact that there is a strong possibility that North Amer-

ican could prevail would, in itself, be a potent tool in influencing the management to give heed to North American's wishes".

(3) That "it is wholly untrue to characterize North American's relationship to PG&E as merely that of a stockholder holding an investment interest."

(4) That "applicant regularly sends to North American a variety of detailed weekly and monthly reports".

(5) That "applicant has not sustained the burden of proving that it is not 'subject to the controlling influence' of North American within the meaning of Section 2(a) (8)."

(6) That "applicant has not demonstrated that its management and policies are not subject to the controlling influence of North American, so as to make it necessary or appropriate in the public interest, or for the protection of investors or consumers, that the applicant be subject to the obligations, duties and liabilities imposed by the Act upon subsidiary companies of holding companies."

(7) That the reason for The North American Company's non-interference with the management or policies of Petitioner has been "North American's complete satisfaction with the local management and that its failure to interfere has been purposeful."

(8) That "there is evidence to justify a finding that even at the present time North American exerts a real influence in the affairs of PG&E, even though this influence is exerted in a negative way".

(9) That "so long as North American is satisfied with the present management, North American's voting power and the proxy machinery in the hands of the management make it virtually impossible for any other interest or group of interests to elect a majority of the directors".

j. The Commission erred in failing to adopt the Report and Findings of Fact of the Trial Examiner recommending that Petitioner's application be granted, and more particularly the following findings and recommendations:

> "That the North American Company does not have the power to control the Pacific Gas and Electric Company;
>
> That the Pacific Gas and Electric Company has never been and is not now controlled, directly or indirectly, by the North American Company;
>
> That the management and policies of the Pacific Gas and Electric Company are not subject to the controlling influence, directly or indirectly, of the North American Company, wherefore it is not necessary or appropriate in the public interest and for the protection of investors or consumers, that the Pacific Gas and Electric Company be subject to obligations, duties and liabilities imposed by the Public Utility Holding Company Act of 1935." (Exhibit C, Finding 181)

k. The Commission, in making and entering the Order herein complained of, acted arbitrarily in that

said Order is contrary to the evidence, which shows that Petitioner is not controlled by The North American Company and that its management and policies are not subject to a controlling influence by said company so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the Petitioner be subject to the obligations, duties and liabilities imposed by the Act upon subsidiary companies of holding companies, and said Order is without evidence to support it.

11. Petitioner is aggrieved by said Order because by reason thereof it is made immediately subject to the Act and to the requirements and restrictions thereof, and to the jurisdiction of the Commission thereunder, and amenable to all rules, regulations and orders of the Commission relating to subsidiaries of registered holding companies or otherwise made applicable to Petitioner. Among other things, Petitioner is thus prohibited, without leave of the Commission (subject to some narrow exceptions and to rules or regulations prescribed by the Commission) from financing its requirements in normal ways; from issuing or selling any of its securities; from exercising any privilege or right to alter the priorities, preferences, voting power or other rights of the holders of its outstanding securities; from acquiring any securities or utility assets or any other interest in any business; from acquiring, retiring or redeeming any of its securities; from paying any dividends in contravention of requirements of the Commission at the time in force; and from

having as directors persons with financial connections not permitted by the rules and regulations of the Commission at the time in force. In addition, Petitioner is required to furnish to the Commission such periodic and special reports and information as the Commission may prescribe, including special certifications by independent public accountants; to submit to such summary investigations and searches and seizure of its books, correspondence, and other papers and records by the Commission or by any holder of its securities as the Commission, in its discretion, may make or permit; and to make and preserve such accounts, cost accounting procedures, correspondence, memoranda, papers, books and other records as the Commission may require from time to time, and is forbidden to keep any other than those so prescribed or approved, or to keep those authorized in any other manner than that so authorized.

Petitioner and its personnel are, by said Order, made subject to civil proceedings to enforce compliance with mandatory rules, regulations or orders of the Commission, and to enjoin any violations of any rule, regulation or order of the Commission, and are also subject to criminal proceedings penalizing violations of the Act or such rules by heavy fines and by imprisonment of any individuals concerned.

12. Petitioner further alleges that the said Order is invalid and void by reason of the fact that the Constitution of the United States confers upon the Congress no power or authority to regulate the

assets of Petitioner located, and the business and affairs of Petitioner conducted, wholly within the State of California, by reason of ownership of its stock by other parties or otherwise, but on the contrary such power and authority are reserved to the respective states or to the people by the Tenth Amendment of said Constitution; and that said Order is arbitrary, capricious and not supported by any substantial evidence or by any facts found by the Commission or by any other facts, and is without warrant of law, and deprives Petitioner and the holders of its securities of liberty and property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States.

13. No previous application for the relief sought in this petition has been made to any other court or judge.

Wherefore, your Petitioner respectfully prays that this Honorable Court review the Order issued September 10, 1941 by the Commission against your Petitioner, modify said Order and set aside that part of the said Order which denies the application of Petitioner, stay the said part of said Order and the effective date thereof until the hearing and determination of this petition, and grant such other and further relief as to the Court may seem just and equitable.

Dated: September 18, 1941.

PACIFIC GAS AND ELECTRIC COMPANY,
By JAMES B. BLACK
President
HERMAN PHLEGER
WM. B. BOSLEY
ROBERT H. GERDES
Attorneys for Petitioner.

BROBECK, PHLEGER & HARRISON,
Of Counsel.

State of California,
City and County of San Francisco—ss.

James B. Black, being first duly sworn, deposes and says:

That he is an officer, to-wit, President, of Pacific Gas and Electric Company, a corporation, the plaintiff named in the foregoing Petition; that he has read the said Petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, that he believes it to be true.

JAMES B. BLACK

Subscribed and sworn to before me this .... day of September, 1941.

FRANK PANTER
Notary Public
in and for the City and County of San Francisco, State of California.

My commission expires November 15, 1947.

[Endorsed]: Petition to review, etc., Filed September 18, 1941, Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Friday, September 19, 1941.

Before: Wilbur and Mathews, Circuit Judges,
St. Sure, District Judge.

[Title of Cause.]

ORDER FOR STAY PENDING REVIEW

Upon oral argument of Mr. Herman Phleger, counsel for petitioner, and upon reading and filing the verified petition of Pacific Gas and Electric Company herein to review and modify or set aside so much of an Order of the Securities and Exchange Commission dated September 10, 1941, as denies the application of said petitioner under Section 2 (a) (8) of the Public Utility Holding Company Act of 1935 to be declared not to be a subsidiary of The North American Company, a registered holding

company under said Act, which said petition prays that pending such review, said portion of said order and the operation thereof be stayed, and the affidavit of James B. Black filed in support of said application for a stay; and it appearing to the Court that by Section 24 of the Public Utility Holding Company Act of 1935 said petitioner is entitled to a review of said order, and that the Court may stay the operation of said order pending review thereof; and it further appearing that unless such stay be granted petitioner would immediately be subject to the obligations, duties and liabilities imposed by said Act, even though said order after review be modified or set aside, and that great and irreparable loss and injury would be suffered by said petitioner unless said order and the operation thereof be stayed pending such review, and good cause appearing therefor,

It Is Hereby Ordered that pending a hearing and determination of the petition filed herein by Pacific Gas and Electric Company seeking to review and modify or set aside so much of an order of the Securities and Exchange Commission dated September 10, 1941, as denies the application of said Pacific Gas and Electric Company for an order declaring it not to be a subsidiary of The North American Company, or until further order of this Court, said portion of said order and the operation thereof be and the same are hereby stayed and suspended.

It Is Further Ordered that plaintiff, within one day from this date, forward by registered mail to

the Secretary of the Securities and Exchange Commission, Washington, D. C., a certified copy hereof.

This Court reserves the right to make such other or further order in the premises as to it may seem just and equitable.

Done at San Francisco, California, this 19th day of September, 1941.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, December 2, 1941.

Before: Garrecht, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered petition to review herein argued by Mr. Herman Phleger, counsel for petitioner, and by Mr. Christopher M. Jenks, counsel for respondent, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 14, 1942.

Before: Garrecht, Haney and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION, AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Petition to Review an Order
of the Securities and Exchange Commission

OPINION AND DISSENTING OPINION

Before: Garrecht, Haney and Stephens,
Circuit Judges.

Haney, Circuit Judge.

The present cause arises on a petition to review and modify, or set aside an order of the Securities and Exchange Commission.

Pacific Gas and Electric Company, petitioner,

hereafter called the company, is a California corporation, and was organized in 1905. On March 23, 1912, the Public Utilities Act of California became effective, and since that date, the company could issue securities only with the approval of the Railroad Commission of California. All its securities now outstanding, have been authorized by the Railroad Commission except 15% of its common stock which was issued prior to March 23, 1912. All the company's public utility properties are located in, and its business is conducted in, the State of California.

The Public Utility Holding Company Act of 1935, hereafter called the act, became effective on August 26, 1935. Section 2(a) (8) of the act defines a "subsidiary company" as meaning:

> "(A) any company 10 per centum or more of the outsanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company * * * unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and
>
> "(B) any person the management or policies of which the Commission after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more persons) so as to make it necessary or appropriate in the public interest

or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon subsidiary companies of holding companies.

"The Commission upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediate persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this chapter upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this chapter upon the applicant as a subsidiary company

of such specified holding company until the Commission has acted upon such application, Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application."

Section 79f makes it unlawful for a subsidiary company of a registered holding company to issue or sell any of its securities except with the approval of the Commission.

On November 29, 1935, the company filed an application with the Commission for an order declaring that it was not a subsidiary company of The North American Company, a registered holding company under the act which has held 17.71% of the company's voting stock since June 12, 1930. On September 4, 1940, the Commission directed a hearing upon such application, and on October 10, 1940, directed that such hearing commence, and it did commence, on November 12, 1940. The hearing concluded on January 16, 1941. The trial examiner on April 22, 1941, filed his report recommending that the company's petition be granted.

On July 1, 1941, the California Railroad Commission authorized the company to issue and sell 400,000 shares of its 5% First Preferred Stock, and it commenced to sell them after July 8, 1941.

On September 10, 1941, the Commission entered an order denying the company's application. At that time the company had sold 199,433 shares of the stock above mentioned. On September 18, 1941,

the company filed a petition in this court to Review and Modify or Set Aside the order of the commission, and for a stay pending such review. On the same date it filed an affidavit in support of the stay. On the following day, this court made an ex parte order staying and suspending the order and the "operation" thereof, reciting "that by Section 24 of the Public Utility Holding Company Act of 1935 said petitioner is entitled to a review of said order, and that the Court may stay the operation of said order pending review thereof".

On October 17, 1941, the Commission moved to vacate so much of the order of September 19, 1941, as provided for the stay and suspension, on four grounds: (1) the Commission's order is not susceptible of being stayed, because of the act, the company is a subsidiary company, and to stay the order is to have no effect other than to leave the company in the status in which the statute places it, i.e., a subsidiary company; (2) if effective to remove the company from its status as a subsidiary, the stay does not preserve the status quo because when the Commission acted, the company was a subsidiary company under the act, and a stay could not change it; (3) no great or irreparable loss or injury will be suffered by the company, if the stay is vacated, but if not, the national public interest and the interests of investors and consumers may be adversely affected; and (4) this court was without jurisdiction to stay the Commission's order because the jurisdiction to stay is for the purpose of preserving the

statu quo, but here, statu quo, i.e., as a subsidiary company, is preserved without the stay.

Upon the hearing of respondent's motion the cause was set for hearing on the merits, and the motion taken under advisement. In view of our decision on the merits, the motion has become moot.

The Commission held that the Trial Examiner had reached his recommendation because he had misconstrued the statute. The Commission construed §2(a) (8) of the act as meaning (1) that the applicant had the burden of proving that its management and policies are not subject to the controlling influence of North American; and (2) that "controlling influence" meant something less in the form of influence on the management or policies of a company than "control" of such company, that "control" includes the power to control, and "subject to a controlling influence" includes susceptibility to domination. It found that petitioner "has not demonstrated that its management and policies are not subject to the controlling influence of North American * * * " The two rules of law mentioned above and the finding are challenged here.

As to the finding, petitioner contends, as the Board found "that the record does not reveal any past attempts by North American to interfere affirmatively with the management or policies of P. G. & E." If petitioner's contention regarding the second rule of law above mentioned is correct, then reversal follows. However, if the Commission's view on the second rule of law is correct, then the

question arises as to whether there is any substantial evidence to support the finding.

Section 2(a) (8) of the act provides that the Commission shall declare that an applicant is not a subsidiary company, if it finds three facts: (1) that the applicant is not controlled directly or indirectly by a subsidiary company; (2) that the application is not the medium of control of another company by a holding company; and (3) that "the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company * * * so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this chapter upon subsidiary companies of holding companies. Since the statute requires findings of all three facts, in order to exempt a subsidiary as such, and since the third fact was not found by the Commission, the company is not entitled to exemption if the Commission's action regarding the third fact is sustained here.

The company contends that the language of the statute describing the third fact means "actual and existing control", rather than "susceptibility to control" as the Commission held, and since the Commission found that the evidence affirmatively showed a lack of actual and existing control, an exemption order should have been granted. The company quotes a portion of a committee report, and a part of Senator Wheeler's argument in the debates on the act. While the report sheds no light on the pres-

ent question, the portion of the argument mentioned definitely supports the company's view. We think such argument must be disregarded because contrary to the plain meaning of the act. Penna. R. R. Co. v. International Coal Co., 230 U.S. 184, 198-199. If the company's argument were adopted, then the first and third facts enumerated in the statute would be identical, and the third would therefore be surplusage. In view of the rule, that a legislative body is presumed to have used no superfluous words in a statute (Platt v. Union Pac. R. Co., 99 U.S. 48, 58), and the rule that "effect shall be given to every clause and part of a statute" (Ginsberg & Sons v. Popkin, 285 U.S. 204, 208) we think the construction of the statute by the Commission which gives effect to the entire statute is correct and must be sustained.

We are thus brought to the questions regarding the findings and the evidence. The Commission found that the company had not "demonstrated" a lack of susceptibility to control by North American. The company argues that the Commission thus saddled it with a burden of proof to a clear and convincing degree. The Commission argues that the company has the burden of proving the lack of susceptibility to control. Dispute between the parties exists with respect to the question as to whether the statute creates a rebuttable presumption that the company is a "subsidiary company" or whether the company is "prima facie" such a subsidiary.

The words "burden of proof" are used in two senses: (1) the duty to prove a charge by a degree

of proof such as a preponderance of the evidence; and (2) the duty to go forward with the evidence. Department of Water and Power v. Anderson, 9 Cir., 95 F(2d) 582, 583. In the first sense, "burden of proof" has no application to an administrative proceeding such as this. The statute does not specify any degree of proof required for any particular finding. The statute in question permits an application to be granted without hearing, but requires "notice and opportunity for hearing" if the application is denied or otherwise disposed of.

The statute does not even specify the party who shall have the duty of opening and closing the hearing. If such a hearing is held, it is only commonsense which requires the company to present its evidence, since it seeks a particular declaration. When the evidence is all in, the Commission considers the whole body of evidence, both pro and con, and finds what the ultimate facts are unrestrained by any rule regarding burden of proof, as used in the first sense. The sole restraining rule is that the fact found must be supported by substantial evidence, as is provided in §24(a) of the act, and if such fact is so supported, it is conclusive, whether it is supported by what someone other than the Commission thinks is a *preponderance* of the evidence or not.

Since the company is, by the terms of the act, a "subsidiary" company and can be relieved of that status only by an order of the Commission, and since such an order may be made only when the Com-

mission finds three facts, in a broad sense, it is natural to say that the company has the "burden of proof". However, when those words are used, neither of the technical senses, mentioned above, is intended. What is meant is that the company must present substantial evidence which convinces the Commission as to the three facts mentioned. We do not understand that anything different was meant in Securities and Exchange Com'n v. Sunbeam Gold M. Co., 9 Cir., 95 F(2d) 699, 702 and Detroit Edison Co. v. Securities Exchange Commission, 6 Cir., 119 F(2d) 730, 739.

The company contends that the finding of the Commission that the company "has not demonstrated that its management and policies are not subject to the controlling influence of North American" is not sustained by substantial evidence. The Commission relied on facts and made inferences to support its finding, as follows:

(a) North American owns 17.71% of the voting stock in petitioner. The second largest stockholder holds 1.72% of the voting stock. The rest of the stock is owned by corporations and individuals, scattered widely. Of the total voting stock 47.9% is held by non-residents. The Commission said:

> " * * * It is apparent that if a vital and substantial conflict arose between applicant and North American and matters came to the point of a proxy fight, the holdings of North American represent a tremendous advantage in any such fight. Counsel have argued as to the possible outcome of such a proxy fight. We need

not speculate here as to whether North American's 17.71% of voting power, plus the votes it could attract be offset by the voting power which the local management could attract. It cannot be denied that, in any event, North American's holdings would make it a formidable opponent. And the mere fact that there is a strong possibility that North American could prevail would, in itself, be a potent tool in influencing the management to give heed to North American's wishes."

(b) North American's holdings have represented from 25% to 30% of the total votes cast at stockholders' meetings from 1931-1940. The Board said:

"* * * First, so long as North American is satisfied with the present management, North American's voting power and the proxy machinery in the hands of the management make it virtually impossible for any other interest or group of interests to elect a majority of the directors. Second, North American's votes have represented 25 to 30% of the votes cast at stockholders' meetings and, by virtue of its stockholdings, North American had the power to break a quorum at all but two stockholders' meetings since it became applicant's largest stockholder; if it had chosen to do so, no business could have been transacted at such meetings. Third, the ownership of virtually 1/3 of applicant's common stock gives North American an effective veto power over any corporate

action requiring the consent of 2/3 of each class of stock—e.g., mergers and consolidations."

(c) Petitioner was organized in 1905 and now represents the consolidation of over 400 separate companies. It formerly purchased power from Great Western Power Company, which was organized in 1906. During most of the latter's existence, 90% of its revenues came from territory in competition with petitioner. Several unsuccessful attempts were made by petitioner to acquire the properties of Great Western between 1911 and 1925. Petitioner's present president is one Black, formerly an employee of Great Western. North American acquired control of Great Western in 1925, and in 1927, Black went to New York as vice president of North American—his principal duties at that time being to keep in touch with and assist Great Western and its subsidiaries.

In 1930, following negotiations begun in the previous year between Black and petitioner's then president, resulted in the acquisition by petitioner of the securities held by North American in Great Western and its subsidiaries. It was orally agreed that North American would not interfere with petitioner's management, that North American would be entitled to three members on petitioner's board of directors and one member on its executive committee. Black became a member of petitioner's board of directors as North American's representative.

Regarding these facts, the Commission said:

"It is wholly untrue to characterize North

American's relationship to P. G. & E. as merely that of a stockholder holding an investment interest. It now has two of its representatives on P. G. & E.'s board of directors, and by cumulating its votes it could elect at least three directors. Moreover, under the agreement made at the time of the Western Power Deal, it could at any time have a representative elected to applicant's executive committee. Against the background of the other facts we have discussed, the fact that North American has been given the 'right' to such representation on applicant's board of directors and executive committee is, we think, of material significance. We find some significance, too, in the frequent and detailed reports of every phase of applicant's operations sent by applicant to North American; no such reports are sent to any other stockholder."

(d) Regarding the facts mentioned under (c), the Commission said:

"Nor can we disregard the fact that applicant's most important executive officer, Black, its president, was, for eight years just prior to his appointment, a senior executive of North American. From February 1927 to June 1930 Black's primary duty as vice president of North American was to exercise holding company supervision over the activities of the subsidiaries of Western Power Corporation. He conducted the negotiations for North American in which Western Power was transferred to P. G. & E. and as a result of which North Amer-

ican acquired its interest in P. G. & E. For five years, from 1930 to 1935, Black was the individual in the North American organization who, more than any other one person, kept advised as to applicant's business and followed applicant's affairs in the light of North American's interest. It is also significant that since Black became president of P. G. & E., no effort has been made to North American to have representation in the executive committee, and no one in North American's management has followed applicant's affairs as closely as he did. It is wholly unreal to suppose that Black would be uninfluenced by these circumstances and, in his dealings with North American, would treat it as merely a large stockholder of P. G. & E."

The facts, as thus stated, are not disputed. It is contended that the inferences drawn are contrary to the evidence. Such evidence was, of necessity, opinion evidence, because the facts inferred by the Commission were events which *might* happen, not what actually happened. In other words, the evidence relied on consisted of predictions that specified events *would not* occur, and did not consist of facts that such events *could not* happen. Manifestly, the Commission was not bound to accept the predictions as facts. As said in Labor Board v. Link-Belt Co., 311 U.S. 584, 597: "Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts * * * The Board, like other expert agencies dealing with specialized fields * * * has the function of appraising conflicting and cir-

cumstantial evidence, and the weight and credibility of testimony". The rules quoted are applicable here.

Regarding the inferences made, the only question which we may consider is one of law, that is, were the inferences made reasonable? We think a reasonable man could reach the conclusion the Commission reached, and therefore the finding must be sustained.

The company also contends that the Commission did not consider other evidence which tended to show that North American had not attempted to dominate the company in the past. However, as quoted above, the Commission found specifically in accordance with such evidence. In view of what we regard as the proper construction of the words in the statute, "subject to a controlling influence", a finding for the company is not compelled by the fact that North American had not dominated the company in the past. Congress may prevent an evil from occurring, and need not wait till the damage is done before acting. Compare: Edison Co. v. Labor Board, 305 U.S. 197, 222. We think the construction of the statute approved here, carries out what we think Congress regarded as a preventive measure.

After finding that petitioner had failed to sustain its burden of showing that it was not subject to the controlling influence of North American, the Commission held that it was necessary or appropriate in the public interest or for the protection of investors or consumers, for petitioner to be subject to

the act. It stated in this connection that petitioner "is a company with stated assets of almost $800,000,000 serving in excess of 1,500,000 customers; its securities are listed and traded on national security exchanges and are owned by investors throughout the country". This finding arises by reason of §2(a) (8) of the act quoted above.

It is obvious that what is "necessary or appropriate in the public interest" is a question for the Commission to decide. Section 1(b) of the act enumerates a number of evils existing between holding companies and their subsidiaries. Section 1(c) provides in part:

> " * * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted to meet the problems and eliminate the evils as enumerated in this section * * * "

The company contends that this quoted provision is the standard by which the Commission is to be guided in determining what is "necessary or appropriate in the public interest" and that there is no showing of the existence of present evils, or of "such a controlling influence as would enable the holding company to bring about the evils enumerated in the Act".

We think it is unnecessary to decide this question, because of the construction of §2(a) (8). The words "so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obli-

gations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies", which we will refer to as the necessity clause, are such that the meaning of the entire sentence is not clear. We think there are three possible constructions of the entire sentence.

The narrowest construction of the sentence arises when the necessity clause is construed as modifying all three of the conditions mentioned in (i), (ii) and (iii), that is, e.g., that the control mentioned in (i) must be of a kind which makes it necessary or appropriate for the applicant to be held to be subject to the act. The Commission, in In the Matter of Wisconsin Valley Improvement Company, ... S.E.C. ..., found that the applicant was subject to the controlling influence of holding companies, but that because of "the character of applicant's business and the nature and extent of statutory and state commission regulation" it was not necessary or appropriate to make the act applicable to the applicant. That decision cannot be said to be unreasonable. It seems as reasonable to say that there might be actual control under (i) and yet the same factors would prevent the control from being exercised.

A second, and more liberal construction, insofar as it gives the Commission broader powers, arises when the necessity clause is considered as modifying only the condition mentioned in (iii). In other words, if there is control, specified in (i) or applicant is the intermediary through which such control is exercised, then the application should be denied, re-

gardless of whether such control makes it necessary or appropriate that the applicant be held to be subject to the act, and that it is only when the applicant is subject to a controlling influence, that there must be necessity or appropriateness in the public interest for applicant to be subject to the act. Considered superficially from the standpoint of sentence structure the second construction seems to be correct. However, even though there is no control under (i) it may be that such control cannot be exercised, or the control may be regarding a thing which could not possibly harm anyone. In either event, it seems illogical to say that the necessity clause modifies the controlling influence under (iii) but not the control under (i).

A third construction, and the one which gives to the Commission the broadest powers, arises when the necessity clause is not considered as a modifying clause at all, but as a fourth condition. As thus construed, before the application could be granted it would be necessary for the Commission to find that there was no control under (i), that applicant was not an intermediary through which such control might be exercised under (ii), that applicant was not subject to a controlling influence under (iii), and that it was not necessary or appropriate in the public interest to make the act applicable to applicant. If the contrary of any of the four conditions thus enumerated were found by the Commission, then the application would have to be denied. In other words, if the Commission found control under (i), or that applicant was the medium of control

under (ii), or that applicant was subject to a controlling influence under (iii), the application would have to be denied regardless of whether there was necessity or appropriateness under the necessity clause; on the other hand, if the Commission found that none of those three conditions were present, it could still deny the application on the ground that there was a necessity or appropriateness that the act be held to be applicable to the applicant under the necessity clause.

We believe the latter construction is correct. Congress thought that the ownership by one corporation of 10% or more of the voting securities of another sufficient to declare the latter corporation to be a subsidiary, regardless of any other factor. It became a subsidiary not because of "control", or because it was the medium of control, or because it was subject to a "controlling influence", but because of the ownership of at least 10% of its stock. Congress recognized that harm might result to the public when there was such ownership, regardless of whether any of the three factors were present. It did not make as a condition to regulation any of these three factors. It is unreasonable to say that Congress intended to exempt from regulation when those three conditions only were not present. It seems apparent that harm might result to the public when none of such factors was present—that is the harm might spring from other factors. Such factors would be covered by the fourth condition, because of its generality.

This view is not contrary to the result of the Commission's holding above mentioned. It is inconsistent to say that A is subject to the controlling influence of B, when B is prevented from exercising it. In such event, A is not subject to a controlling influence because B cannot in fact exercise it.

The remaining portion of §2(a) (8) of the act speaks of the "conditions specified in clause (i), (ii) and (iii)". It does not say that there are only three conditions, but makes it clear that the conditions referred to are those "regarding the affiliations or intercorporate relationships". The fourth condition relates to the conditions between the subsidiary and the public.

As thus construed, the application was properly denied regardless of whether the finding under the necessity clause was sustained by substantial evidence or not.

The company suggests that some constitutional questions are involved, but it does not appear that such questions were presented to the Commission, and therefore we cannot consider them. See §24(a).

The petition to review is denied.

Garrecht, Circuit Judge, dissenting:

It appears that North American Company (hereinafter called "North American") owns, controls, and holds with power to vote 17.71% of petitioner's outstanding voting securities. Therefore, by statutory definition petitioner is a subsidiary of North American. Following the provisions set forth in the Act, Pacific Gas and Electric Company sought by appropriate petition to bring itself within the ex-

emption provided in the Act by alleging and offering to establish that (1) it is not controlled, directly or indirectly, by North American; (2) it is not an intermediary company through which control of another company is exercised; and (3) its management or policies are not subject to such a controlling influence, directly or indirectly, by North American, so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers, that it be subject to obligations, duties, and liabilities imposed in the Act upon subsidiary companies.

The Commission issued notice of, and ordered, a hearing on petitioner's application. The hearing was had before a trial examiner. Although there was no real dispute as to the facts as set forth in the trial examiner's report, both counsel for petitioner and counsel for the Commission filed with the trial examiner separate requests for specific findings.

The report and findings of fact made by the trial examiner found and concluded that petitioner was entitled to the order which it sought. Thereupon counsel for the Commission filed exceptions to the report, and the matter was presented to the Commission upon brief and oral argument, and thereafter the Commission made findings, rendered an opinion, and entered its order denying petitioner's application.

Although by the terms of the statute Pacific Gas and Electric Company is an affiliate of North American, because it does hold more than ten percent of petitioner's stock, nevertheless if the evidence shows

that it is not controlled and that its management and policies are not subject to a controlling influence, directly or indirectly, by such holding company, it is entitled to an order of the Commission declaring the company not to be a subsidiary.

While the Commission concedes that the evidence shows that there is no control of petitioner by North American, the Commission maintains that it may still deny petitioner's application upon the assumption or supposition that merely ownership of 17.71% of the stock of petitioner by North American renders it subject to the controlling influence of such holding company despite the facts that there never has been any exercise of control or any effort in that direction and in the face of the evidence of the officers of North American that it holds the stock as an investment only and that there is no intention to exercise any control over petitioner and the further evidence of the officers and management of petitioner that they would not permit such control. It is also an admitted fact that petitioner's utility properties are all located, and its business is conducted, in the state of California. In this regard the Commission said: "On the basis of the record before us, we find that applicant and all of its subsidiary companies are predominantly intrastate in character and carry on their business in California, the State in which each of them is organized, and that applicant is predominantly a public utility company whose operations as such do not extend beyond the State of California. * * * "

Petitioner is subject to the public utilities act of

said state and can issue securities only with the approval of the California Railroad Commission. This state commission by its representatives appeared at the hearing and presented a statement, which was received by the Commission, showing the manner and extent of its regulation of appellant, and in this document the California Railroad Commission stated that it was "aware of no instance during the course of this Commission's regulation of Pacific Gas and Electric Company when its management or policies appear to have been either controlled or influenced by North American Company".

The Question of Control

Referring to the question of control as indicated by stock ownership, the court in Electric Bond & Share Co. v. Sec. & Exch. Com., 2 Cir., 92 F2d 580, 592, said:

> " * * * Congress elected the element of stock ownership, a factor most usually indicative of control, as prima facie evidence of control. The burden of proof, which is cast upon the utility company to prove otherwise, is not onerous. Judicial review is provided to guard against any arbitrary action on the part of the Commission and to afford a remedy should the Commission's finding be not supported by substantial evidence. * * * "

That case was subsequently appealed to the Supreme Court of the United States under the same title, 303 US 419. In the latter case the Department of Justice, for the Securities and Exchange Commis-

sion, filed an able and carefully prepared brief, discussing various sections of the Act. Upon the subject of stock control, because of the clearness of the reasoning and aptness of application to the present discussion, we quote from that brief the following (Br. for Resp., p. 6 of Apx. A):

> "A holding company, by express definition * * * is a company which *actually controls* operating companies, and not a company which merely has an investment in operating companies. Conversely, a subsidiary company, by express definition * * * is a company *actually controlled* by the holding company, and not simply a company in which the holding company has a substantial interest. Ten percent voting stock ownership creates a presumption of control in order to facilitate administration of the Act and to prevent ready evasion. That presumption, however, can readily be rebutted by either the putative holding company or the putative subsidiary company (Section 2(a) (7) and (8)) upon a showing that the company does not in fact exercise control. * * * No true investment company—i.e., a company which does not control the operating companies in which it invests—is in any manner affected by the act."

The following quotation is also from that brief (Br. for Resp., pp. 197-198):

> " * * * a company may readily prove if such be the fact that it does not possess control. Such burden of proof is not onerous because every

company has completely within its own organization full knowledge and control of all the facts and evidence * * * . Judicial review is provided to guard against any arbitrary action on the part of the Commission, and to afford a remedy should the Commission's findings of fact be not supported by substantial evidence (Section 24(a)). * * * "

With these declarations of the court and from the Commission in mind let us have a look at the testimony as found in the record and which was not contradicted.

The present board of directors consists of five directors who are officers and full-time employees of petitioner, eight directors who are prominent San Francisco business men, and two directors, Fogarty and Freeman, who are admittedly representatives of North American. Neither of these two North American representatives is a member of the executive committee.

All directors and principal officers, with the exception of the two directors who are officers of North American, are residents of San Francisco and vicinity; were either born in California or came to California early in life and have resided in California since that time; are prominently identified with California enterprises, and have no substantial interest in any eastern business or any corporation whose business is not principally conducted in California. During the entire period of petitioner's existence the members of the board of directors, with few ex-

ceptions, have been residents of San Francisco and vicinity, and have and do own and represent substantial stock interests in petitioner, and the fathers of four directors (directors C. O. G. Miller, Norman B. Livermore, A. E. Wishon, and W. W. Crocker) were active in the affairs of predecessor companies. All of the directors, with the exception of directors Fogarty and Freeman, know each other well, some are associated together in other enterprises, and several have known each other from boyhood.

The directors, other than those who are active executives of the Company, and excepting directors Fogarty and Freeman, are prominent in other business affairs in San Francisco and vicinity; two are chairmen of the boards of local banks, one is president of a third bank; all are directors of numerous corporations, including other utilities, and several are officers or trustees of educational or charitable institutions.

Each of petitioner's local directors to whom the question was propounded, namely, Messrs Miller, McKee, Crocker, Chickering, Livermore, Coghlan, Palmer, Nichols, McIntosh, Wishon, and Black, testified that it was his opinion that North American could not, if it attempted to do so and its attempts were resisted by the local directors, secure sufficient proxies to obtain a majority of the stock represented at a stockholders' meeting.

Mr. Black testified that he would oppose any attempt by North American to control or influence the management or policies of the petitioner with "every resource at my command" and that he was

sure they would not be successful in a proxy fight because——

> "This company has a rather unique position in San Francisco and in California. It has been known for many years as a California company. The fact that the Great Western Power Company was controlled by an eastern company, the Western Power Corporation, was a great handicap to the Great Western Power Company in doing business here and particularly in competition with the Pacific Gas and Electric Company. I know something of that feeling. I think 48 percent of our stock is held here in California and I think without question that stock would be almost unanimously opposed against any attempt by any eastern interest, particularly any New York holding company, to get control of the company.
>
> "Our directors are men not only who are men who own, or are able to influence very large blocks of stock directly, but they have a standing in the community and in the business world which I think would be very decisive in getting large amounts of stock proxies from holders outside of the State. I am sure that the community as a whole would be entirely on the side of the company in any such fight."

Director Fogarty, the representative of North American on the board, testified that the management or policies of petitioner were neither directly or indirectly subject to a controlling influence by North American. Nor had that company ever at-

tempted to influence or control the management. He also said that as a practical matter it would not be possible. Mr. Freeman, the other representative, corroborated this view. Mr. Fogarty never attended a directors' meeting. This is also true of Mr. Freeman, who has never been in California.

The testimony of all of these witnesses is not contradicted.

It is probably worth remarking in this connection that North American has never solicited proxies; in fact, its officers or representatives have never voted its own stock, its proxies having been sent to other stockholders. If there existed any apprehension that North American might seek proxy control, the Commission has the power to prevent North American from soliciting any proxy.

To reach the conclusion arrived at by the Commission every circumstance is viewed with a hostile eye and every instance tortured into some semblance of sinister purpose. Thus, the selection of James B. Black as president of appellant upon the unexpected death of Mr. Hockenbeamer, who had been president for many years, is pointed to as unmistakable proof of the evil influence exerted by North American, because at the time of Black's appointment he was the vice-president of North American.

It must be admitted that Black probably was as well qualified for the position as anyone anywhere; his career is altogether a notable one. His personal, professional, and administrative achievements are detailed at some length in the record, from which we summarize briefly: He came with his parents to

California at the age of twelve and has lived in San Francisco and vicinity ever since, with the exception of the short period when he resided in New York and served as vice-president of North American. He was educated in the schools of Oakland and San Francisco and at the University of California, from which he graduated in 1912 in engineering. After graduation he was employed as a service inspector by City Electric Company, then a subsidiary of Great Western operating in San Francisco. About 1915, the properties of City Electric Company were taken over by Great Western, and Mr. Black successively engaged in sales, sales engineering, and administrative work in its San Francisco division. Later he became division manager, assistant general agent and general sales manager, and acting general manager, and in 1922 was made vice-president, general manager and a director of that company. After North American acquired control of Western Power Corporation, Mr. Black retained these positions until February, 1927, when he went to New York at the invitation of North American as one of its vice-presidents.

His selection as president of Pacific Gas and Electric Company was entirely the result of the action of the California directors of that company, many of whom were acquainted with Black's capabilities. The fact that he was a Californian, that he was familiar with some of the properties of the company, and had wide experience were deemed qualifications, and his selection met with the unanimous approval of the board of directors. No suggestion of Mr.

Black's election was made by anyone in North American; his selection was not anticipated by the officers of that company, to whom it was a surprise. There is no evidence in the record indicating that North American played any part in the choice of Black as president of petitioner, other than to consent when the California directors asked permission to offer the position to him. When Black accepted the position he assured the California directors that he would sever all connections with North American. He has never sought or received the advice, approval, or recommendations of North American or its officers on any dividend rate, salary, refinancing, or any other pending matter. There is no difference between the information received by North American nor in the other relations with petitioner since Black became president than existing before that time.

Not only did the Commission disregard the uncontradicted evidence substantiating that there was no "control" or "controlling influence", it also disregarded a specific and important instance revealed by the evidence which very persuasively negatived such control. At one of the meetings of the board of directors of Pacific Gas and Electric, at which the question of declaring a dividend was up for consideration, it was voted that the dividend for that year be declared at the rate of six percent instead of the usual eight percent. The representatives of North American requested the board to reconsider this action, but it did not accede to the request.

Notwithstanding the uncontroverted evidence to the contrary, the Commission went off into the realm of speculation as to what might happen if North American should undertake to engage in a proxy fight with appellant's existing management for control, and it determined that the mere fact that there might be a strong possibility (based likewise on conjecture) that North American could prevail was itself proof of "susceptibility" to a controlling influence.

This opinion is much too long, but we must at least mention that there are other instances where the Commission very frankly has interpreted the testimony of the witnesses contrary to their evidence. These interpretations, which are exaggerated into some semblance of an argument, are then designated as inferences of the Commission as to "events which might happen" but "not what actually happened". The majority opinion in approving these methods of the Commission quotes an excerpt from Labor Board v. Link-Belt Co., 311 US 584, 597, as follows: "Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts. * * * The Board, like other expert agencies dealing with specialized fields * * * has the function of appraising conflicting and circumstantial evidence, and the weight of credibility of testimony". But here there is no conflicting evidence to appraise, and as to weight and credibility of testimony it must be noted that the witnesses who testified contrary to the findings were outstanding men of affairs in California, and they were not contra-

dicted or impeached, and no reason appears in the record why they should be discredited.

According to the Commission petitioner was required to "demonstrate" non-control or influence by North American. The Act does not require any such mathematical extreme which excludes possibility of error, 23 CJ 9. It is sufficient if such showing is supported by substantial competent evidence which is not contradicted. Due process requires that the competent evidence adduced be fairly considered by the Commission on its merits. As was said by Justice Brandeis in speaking for the court in the Chicago Junction Case, 264 US 258, 265, "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." In Morgan v. United States, 298 US 468, 480, Chief Justice Hughes said:

> " * * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. * * * "

Moreover, this court is not called upon to determine the credibility of witnesses or to teach a conclusion upon substantially conflicting facts. Indeed, no such question is presented here, since the Commission has said in its opinion that——

> "There is almost no dispute as to the facts in this case as they are set forth in the trial examiner's report and in the briefs of both counsel. The point of issue with respect to the application under Section 2(a) (8) is rather one of statutory interpretation and in this respect we cannot agree with the conclusions reached by the trial examiner",

who found that Pacific Gas is not in fact controlled by, or subject to the controlling influence of, North American.

The Commission principally relies upon the case of Detroit Edison Co. v. Sec. & Exch. Com., 6 Cir., 119 F2d 730. It is submitted that the facts in that case are so different from the one before us that it cannot be considered an authority to support the action of the Commission here. In the Detroit Edison case, by agreement with two existing companies, a syndicate organized by North American acquired their stock and organized the Detroit Edison Company. Its officers and directors were all designated by North American. On behalf of its syndicate North American then offered all of the stock of the corporation and agreed to finance and furnish other assistance to the new company on certain terms. By the deal the syndicate acquired three million dollars of Edison's first mortgage bonds and fifty thousand

shares of its stock. The Edison then began operations. Thereupon the syndicate was dissolved, and North American retained more than 10 percent of petitioner's outstanding voting securities. The record shows that North American dominated the board of directors through the years, and at the time of the hearing a majority of the directors still had affiliations with North American. There were other intercompany relationships too extended to detail here, but which are referred to in the opinion and which had been discontinued not long before the hearing. From these facts it was concluded that in the light of Edison's origin and the unbroken continuity of North American's officers, directors, and designees on its board, and its absolute domination for many years by the parent company, it was not entitled to an order granting exemption from the statute. In summing up the situation the court said:

> "The fact that the North American Company had abandoned some of the characteristics of 'controlling influence' over the petitioner at the time of the hearing, did not require the Commission to disregard prior interrelated activities. There is no showing that its latent power to resume such control has been extinguished. The relationship is such that they may enter into similar activities in the immediate future. * * *
>
> * * * * * * *
>
> " * * * Giving due weight to the past transactions of petitioner with the North American and the continuing opportunity for the resump-

tion of such activities and the extent of the petitioner's business and the widely scattered ownership of its stock, the Commission committed no error in denying petitioner exemption from the present Act." (119 F2d at pp. 739-740.)

All the evidence in the case before us shows a complete absence of such relationships and of any control throughout the period since North American became an owner of certain stock of Pacific Gas and Electric Company because of the transfer to it of certain utility properties that it had theretofore owned.

The Commission admits that the record does not reveal any past attempt by North American to interfere with its management or policies. It is likewise conceded that there is no evidence of actual control, nor, as has been shown, is there any substantial evidence from which any legally sound inference can be drawn that there ever was any effort whatsoever by North American to subject appellant to any controlling influence. Nor is there any testimony in the record from which any fair inference can be drawn that petitioner was subject to the controlling influence of North American.

From the discussion in Congress at the time the Act was under consideration and as well from the fair and ordinary meaning of the language, the phrase "subject to a controlling influence" does not mean, as the Commission found and the majority opinion determined, that appellant was required to

"demonstrate" that its management and policies were not "susceptible to control" by North American. "Subject to a controlling influence" is not the equivalent of "*susceptible* to a controlling influence". "Susceptible" and "subject" are not interchangeable or synonymous terms. The word "susceptible" connotes an especial liability to mental or emotional impressions. Advisedly that expression was not used in the statute. But the word "subject" is used, and here it occurs in relation with "control", and in that sense it can be correctly defined as meaning "under rule, authority, or domination". Thus, "subject to a controlling influence", as stated in the statute, is not the same thing as "susceptibility" to a controlling influence as expressed by the Commission. One phrase refers to an actually existing state; the other might be applied to express some future condition which uncertain events might possibly bring about. In considering this aspect of the matter it is important to keep in mind that under the statute the Commission is in a position to act at once if ever the susceptibility should become an actuality, even if the Commission had theretofore granted petitioner an exemption at a time when the facts showed a lack of any actual and existing control or controlling influence.

It is also clear that the vague, artificial tests here employed are not sanctioned by the Act. Nor was it expected that inferences based upon inferences, or suppositions, or even possibilities, would be substituted for substantial evidence.

The facts presented to the Commission and all

reasonable inferences, deductions, and conclusions to be drawn therefrom, considered in their entirety and in relation to one another, negative the findings of the Commission. The inferences which are suggested as supporting the order of the Commission are based on mere suspicion. In Labor Board v. Columbian Co., 306 US 292, 299-300, Mr. Justice Stone said:

> "* * * But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' * * * ."

In vesting the Commission with the duty of ascertaining "control" or "subject to a controlling influence" of one company by another Congress did not imply that a potential facility to exercise control was sufficient to establish such controlling influence. If this alone were sufficient the Congress would not have made provision for the exemption.

The legislative history of the Act corroborates this view. In the course of the debate on the bill, Senator Wheeler, chairman of the Committee in charge, said, with reference to the 10% clause (79 Cong. Rec., p. 8397):

"That is only prima facie evidence; but even if they hold 40 percent of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company, and the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word 'control' is defined in the bill.

Again, Senator Wheeler said (79 Cong. Rec. p. 8439):

"No, Mr. President. Let me make a distinction. The Senator from Delaware said: 'Suppose I own 10 percent of the stock of some company.' Unless I control that company I am not a holding company under the terms of this bill. The mere ownership of the 10 percent of the stock does not of itself make him a holding company, because unless he actually controls the company he is not a holding company. The Senator may overlook the factor of control. He may show that he actually does not control the company in which he owns 10 percent of stock, and if he does not have control he is not a holding company."

While the majority opinion concedes that this discussion in Congress definitely supports the position of appellant, that view is discarded because it is said that if followed, some language of the Act would appear to be surplusage. Neither the Commission nor the Court is warranted in departing from the purposes expressed because of any doubts

that may exist as to the wisdom of following the course which Congress has marked out.

The evidence in the record so clearly sustains the position of petitioner that the majority opinion, in its final analysis, appears to have deemed it necessary to expand the statute beyond its terms. As if to relieve itself from some haunting conviction that the findings have no basis in substantial evidence, the Court proceeds to elaborate a new pronouncement, whereby the Commission can be sustained even admitting that there is no substantial evidence or not any evidence at all.

According to the contention of all the parties, but three conditions must be met to entitle a petitioner to an order of exemption, to wit; (1) that the applicant is not controlled directly or indirectly by a subsidiary company; (2) that the applicant is not the medium of control of another company by a holding company; and (3) that "the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company * * * so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this chapter upon subsidiary companies of holding companies".

The majority opinion, however, after having quoted the above language goes on to say that there is an additional construction, and "one which gives the Commission the broadest powers", which "arises when the necessity clause is not considered as modi-

fying clause at all, but as a fourth condition. * * * if the Commission found that none of those three conditions were present, it could still deny the application on the ground that there was a necessity or appropriateness that the act be held to be applicable to the applicant under the necessity clause. We believe the latter construction is correct. * * * " And in conclusion the opinion recites:

> " * * * It is unreasonable to say that Congress intended to exempt from regulation when those three conditions only were not present. It seems apparent that harm might result to the public when none of such factors was present—that is the harm might spring from other factors. Such factors would be covered by the fourth condition, because of its generality.
>
> * * * * * * * *
>
> "As thus construed, the application was properly denied regardless of whether the finding under the necessity clause was sustained by substantial evidence or not."

It seems to me that the opinion of the Court has added to the Act by judicial construction conditions not imposed by Congress and by which the Commission has been relieved of the obligation which requires that the findings be sustained by substantial evidence.

The order of the Commission is arbitrary and capricious, and should be reversed.

[Endorsed]: Opinion and Dissenting Opinion. Filed Apr. 14, 1942. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, June 6, 1942.

Before: Garrecht and Stephens, Circuit Judges.

[Title of Cause.]

ORDER GRANTING PETITION FOR REHEARING

In the above entitled case this Court (three judges sitting, two judges agreeing, one dissenting) has announced a construction of the Securities and Exchange Act which, if adhered to, will have important and far reaching effect upon the administration of that Act.

The petitioner has filed a motion for rehearing and with it a supporting brief which calls our attention to the fact that our construction of the Act was not intimated in either brief or in the oral argument and that such construction raises serious constitutional questions.

Upon due consideration we have come to the conclusion that the rehearing should be had and accordingly petitioner's request therefor is hereby granted.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, December 18, 1942.

Before: Wilbur, Garrecht, Denman, Mathews, Haney, Stephens and Healy, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered petition for review herein argued by Mr. Herman Phleger, counsel for petitioner, and by Mr. John F. Davis, Solicitor, Securities and Exchange Commission, counsel for respondent, and submitted to the Court for consideration and decision, with leave to counsel for respondent to file additional authorities.

At a Stated Term, to wit: The October Term 1943, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the eighteenth day of November in the year of our Lord one thousand nine hundred and forty-three.

Present:

Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding,

Honorable Francis A. Garrecht, Circuit Judge,
Honorable William Denman, Circuit Judge,
Honorable Clifton Mathews, Circuit Judge,
Honorable Albert Lee Stephens, Circuit Judge,
Honorable William Healy, Circuit Judge.

[Title of Cause.]

No. 9918

ORDER AFFIRMING ORDER OF SECURITIES AND EXCHANGE COMMISSION

Order of Securities and Exchange Commission herein affirmed by an equally divided Court.

[Title of Circuit Court of Appeals and Cause.]

DISSENTING OPINION AND CONCURRENCE

Garrecht, Circuit Judge, dissenting:

I dissent from the per curiam decision entered herein denying the petitioner's application, for the reasons hereinafter stated.

This cause has been pending before the court upon a rehearing en banc. Former opinions of this court herein are found in 127 F.2d 378, et seq.

The issues arise on the petition of Pacific Gas and Electric Company to review and modify or set aside an order of the Securities and Exchange Commission, which denied petitioner's application for an

order, pursuant to Section 2 (a) (8) of the Public Utility Act of 1935 (49 Stat. 803, 807) declaring it to be not a subsidiary of the North American Company, a registered holding company owning more than 10% of the petitioner's voting stock.

Pacific Gas and Electric Company, petitioner, in the evidence and also herein sometimes referred to as P. G. & E., is a California corporation, organized in 1905. On March 23, 1912, the Public Utilities Act of California became effective, and since that date the Company could issue securities only with the approval of the Railroad Commission of California. All its securities now outstanding, have been authorized by the said Commission except 15% of its common stock which was issued prior to March 23, 1912. All the Company's public utility properties are located in, and its business is conducted in, the state of California.

The Public Utility Act, hereinafter called the Act, became effective on August 26, 1935 (49 Stat. 803). The portions of said Act pertinent to this discussion are as follows:

> "Sec. 2(a) (8) 'Subsidiary company' of a specified holding company means—
>
> "(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such

company not to be a subsidiary company of such holding company; and

"(B) any person the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies.

"The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more persons) so as to make it necessary or appropriate in the pub-

lic interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. * * * "

Section 6 of the Act (49 Stat. 814) makes it unlawful for a subsidiary company of a registered holding company to issue or sell any of its securities except with the approval of the Commission.

It appears that North American Company, hereinafter called North American, owns, controls and holds with power to vote, 17.71% of petitioner's outstanding voting securities and is therefore, by statutory definition, a subsidiary of North American, unless declared otherwise by the Commission. Following the provisions of the Act, petitioner, on November 29, 1935, sought by appropriate petition to bring itself within the exemptions provided in the Act by alleging and offering to establish that (1) it is not controlled, directly or indirectly, by North American; (2) it is not an intermediary company

through which control of another company is exercised; and (3) its management or policies are not subject to such a controlling influence, directly or indirectly, by North American, so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers, that it be subject to obligations, duties and liabilities imposed in the Act upon subsidiary companies.

On September 4, 1940, the Commission directed a hearing upon such application and on October 10, 1940, directed that such hearing commence. It began on November 12, 1940, and was concluded on January 16, 1941. The hearing was had before a trial examiner. Although there was no real dispute as to the facts as set forth in the trial examiner's report, both counsel for petitioner and counsel for the Commission filed with the trial examiner separate requests for specific findings.

The trial examiner on April 22, 1941, made his report and findings of fact. He found and concluded that petitioner was entitled to the order which it sought. Thereupon counsel for the Commission filed exceptions to the report, and the matter was presented to the Commission upon briefs and oral argument and thereafter on September 10, 1941, the Commission entered its order denying petitioner's application. The case was brought to this court upon petition to review and modify or set aside said order.

The Commission, in concluding its findings and opinion, said:

" * * * we hold that applicant has not demonstrated that its management and policies are not subject to the controlling influence of North American, so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed by the Act upon subsidiary companies of holding companies.

"We desire to emphasize that our holding in this respect is not to be taken to mean that any stigma is cast upon applicant or that we think that applicant is not properly regarded as a California corporation. Nor do we mean to indicate that the influence of North American necessarily is or will be improperly exercised. The only question which we have decided is that, in the circumstances of this case where the statute presumptively requires that PG&E be regulated as a subsidiary of North American, the facts in the record before us do not demonstrate that PG&E is entitled to be excepted from the general requirement of regulation as a subsidiary of a registered holding company."

Further, the Commission said:

" * * * There is almost no dispute as to the facts in the case as they are set forth in the trial examiner's report and in the briefs of both counsel. The point of issue with respect to the application under Section 2(a) (8) is rather one of statutory interpretation and in this re-

spect we cannot agree with the conclusions reached by the trial examiner. Our reasons for this decision are as follows:

"First, it is clear that the application herein cannot be granted unless we can find that applicant has sustained the burden of demonstrating that its management and policies are not subject to the controlling influence of North American. * * * "

We call attention to the fact that the findings and conclusions of the Commission are based on inference and surmise in many instances in absolute conflict with the testimony which was uncontradicted and not discredited. The Commission made inferences to support its finding, as follows:

North American owns 17.71% of the voting stock in petitioner. The second largest stockholder owns 1.72% of the voting stock. The rest of the stock is owned by corporations and individuals, scattered widely. Of the total voting stock 47.9% is held by non-residents. The Commission said:

" * * * It is apparent that if a vital and substantial conflict arose between applicant and North American and matters came to the point of a proxy fight, the holdings of North American represent a tremendous advantage in any such fight. Counsel have argued as to the possible outcome of such a proxy fight. We need not speculate here as to whether North American's 17.71% of voting power, plus the votes it could attract would be offset by the voting

power which the local management could attract. It cannot be denied that, in any event, North American's holdings would make it a formidable opponent. And the mere fact that there is a strong possibility that North American could prevail would, in itself, be a potent tool in influencing the management to give heed to North American's wishes."

North American's holdings have represented from 25% to 30% of the total votes cast at stockholders' meetings from 1931-1940. The Commission said:

"* * * First, so long as North American is satisfied with the present management, North American's voting power and the proxy machinery in the hands of the management, make it virtually impossible for any other interest or group of interests to elect a majority of the directors. Second, North American's votes have represented 25 to 30% of the votes cast at stockholders' meetings and, by virtue of its stockholdings, North American had the power to break a quorum of all but two stockholders' meetings since it became applicant's largest stockholder; if it had chosen to do so, no business could have been transacted at such meetings. Third, the ownership of virtually 1/3 of applicant's common stock gives North American an effective veto power over any corporate action requiring the consent of 2/3 of each class of stock—e.g., mergers and consolidations."

Petitioner's present president is one Black, formerly an employee of Great Western Power Company. North American acquired control of Great Western in 1925, and in 1927, Black went to New York as vice president of North American—his principal duties at that time being to keep in touch with and assist Great Western and its subsidiaries.

In 1930, following negotiations begun in the previous year between Black and petitioner's then president, the petitioner acquired the securities held by North American in Great Western Power Company and its subsidiaries. It was orally agreed that North American would not interfere with petitioner's management, that North American would be entitled to three members on petitioner's board of directors and one member on its executive committee. Black became a member of petitioner's board of directors as North American's representative. Regarding these facts, the Commission said:

> "It is wholly untrue to characterize North American's relationship to P.G.&E. as merely that of a stockholder holding an investment interest. It now has two of its representatives on P.G.&E.'s board of directors, and by cumulating its votes it could elect at least three directors. Moreover, under the agreement made at the time of the Western Power Deal, it could at any time have a representative elected to applicant's executive committee. Against the background of the other facts we have discussed, the fact that North American has been given the 'right' to such representation on applicant's

board of directors and executive committee is, we think, of material significance. We find some significance, too, in the frequent and detailed reports of every phase of applicant's operations sent by applicant to North American; no such reports are sent to any other stockholder."

Further, the Commission said:

"Nor can we disregard the fact that applicant's most important executive officer, Black, its president, was, for eight years just prior to his appointment, a senior executive of North American. From February 1927 to June 1930 Black's primary duty as vice president of North American was to exercise holding company supervision over the activities of the subsidiaries of Western Power Corporation. He conducted the negotiations for North American in which Western Power was transferred to P.G.&E. and as a result of which North American acquired its interest in P.G.&E. For five years, from 1930 to 1935, Black was the individual in the North American organization who, more than any other one person, kept advised as to applicant's business and followed applicant's affairs in the light of North American's interest. It is also significant that since Black became president of P.G.&E., no effort has been made by North American to have representation in the executive committee, and no one in North American's management has followed ap-

plicant's affairs as closely as he did. It is wholly unreal to suppose that Black would be uninfluenced by these circumstances, and, in his dealings with North American, would treat it as merely a large stockholder of P.G.&E."

Admittedly, P.G.&E. is not controlled by North American and is not an intermediary company, therefore clauses (i) and (ii) of Section 2(a) (8) of the Act are not here involved. The only issues arising under clause (iii), which requires petitioner to show that "the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company * * * so as to make it necessary or appropriate in the public interest * * * that the applicant be subject to the obligations, duties, and liabilities imposed in this title * * *." Although the initial burden is on petitioner to prove to the Commission that its management and policies are not subject to North America's "controlling influence", the Commission's function is to draw adequate and fair inferences from the evidence. This the Commission failed to do.

It is an admitted fact that petitioner's utility properties are all located, and its business is conducted in the state of California. In this regard the Commission said: "On the basis of the record before us we find that applicant and all of its subsidiary companies are predominantly intrastate in character and carry on their business in California, the state in which each of them is organized,

and that applicant is predominantly a public utility company whose operations as such do not extend beyond the State of California. * * * "

Petitioner is subject to the public utilities act of said state and can issue securities only with the approval of the California Railroad Commission. This state commission by its representatives appeared at the hearing and presented a statement, which was received by the Commission, showing the manner and extent of its regulation of appellant, and in this document the California Railroad Commission stated that it was "aware of no instance during the course of this Commission's regulation of Pacific Gas and Electric Company when its management or policies appear to have been either controlled or influenced by North American Company.

While the Commission concedes that the evidence shows there is no control of petitioner by North American, the Commission maintains that it may still deny petitioner's application upon the assumption or supposition that merely ownership of 17.71 percent of the stock of petitioner by North American renders it subject to the controlling influence of such holding company despite the fact that there never has been any exercise of control or any effort in that direction and in the face of the evidence of the officers of North American that it holds the stock as an investment only and that there is no intention to exercise any control over petitioner and the further evidence of the officers and management of petitioner that they would not permit such control.

The Question of Control

Referring to the question of control as indicated by stock ownership, the court in Electric Bond & Share Co. v. Sec. & Exch. Com., 2 Cir., 92 F2d 580, 592, said:

> " * * * Congress elected the element of stock ownership, a factor most usually indicative of control, as prima facie evidence of control. The burden of proof, which is cast upon the utility company to prove otherwise, is not onerous. Judicial review is provided to guard against any arbitrary action on the part of the Commission and to afford a remedy should the Commission's finding be not supported by substantial evidence. * * * "

That case was subsequently affirmed by the Supreme Court of the United States under the same title, 203 US 419. In the latter case the Department of Justice, for the Securities and Exchange Commission, filed an able and carefully prepared brief, discussing various sections of the Act. Upon the subject of stock control, because of the clearness of the reasoning and aptness of application to the present discussion, I quote from the brief the following (Br. for Resp., p. 6, of Apx. A):

> "A holding company by express definition * * * is a company which actually controls operating companies, and not a company which merely has an investment in operating companies. Conversely, a subsidiary company, by express definition * * * is a company actually

controlled by the holding company, and not simply a company in which the holding company has a substantial interest. Ten percent voting stock ownership creates a presumption of control in order to facilitate administration of the Act and to prevent ready evasion. That presumption, however, can readily be rebutted by either the putative holding company or the putative subsidiary company (Section 2(a) (7) and (8) upon a showing that the company does not in fact exercise control. * * * No true investment company—i.e., a company which does not control the operating companies in which it invests—is in any manner affected by it.

The following quotation is also from that brief (Br. for Resp., pp. 197-198):

"* * * a company may readily prove if such be the fact that it does not possess control. Such burden of proof is not onerous because every company has completely within its own organization full knowledge and control of all the facts and the evidence * * * Judicial review is provided to guard against any arbitrary action on the part of the Commission, and to afford a remedy should the Commission's findings of fact be not supported by substantial evidence (Section 24(a)). * * * "

With these declarations of the court and from the Commission in mind let us have a look at the testimony as found in the record and which was not contradicted.

The present board of directors consists of five directors who are officers and full-time employees of petitioner, eight directors who are prominent San Francisco business men, and two directors, Fogarty and Freeman, who are admittedly representatives of North American. Neither of these two North American representatives is a member of the executive committee.

All directors and principal officers, with the exception of the two directors who are officers of North American, are residents of San Francisco and vicinity; were either born in California or came to California early in life and have resided in California since that time; are prominently identified with California enterprises, and have no substantial interest in any eastern concern, business or corporation whose business is not principally conducted in California. During the entire period of petitioner's existence the members of the board of directors, with few exceptions, have been residents of San Francisco and vicinity, and have owned and do own and represent substantial stock interests in petitioner, and the fathers of four directors (directors C.O.G. Miller, Norman B. Livermore, A. E. Wishon and W. W. Crocker) were active in the affairs of predecessor companies. All of the directors, with the exception of Fogarty and Freeman, know each other well, some are associated together in other enterprises, and several have known each other from boyhood.

The directors, other than those who are active executives of the Company, and excepting Fogarty

and Freeman, are prominent in other business affairs in San Francisco and vicinity; two are chairmen of boards of local banks, one is president of a third bank; all are directors of numerous corporations, including other utilities, and several are officers or trustees of educational or charitable institutions.

Each of petitioner's local directors to whom the question was propounded, namely, Messrs. Miller, McKee, Crocker, Chickering, Livermore, Coghlan, Palmer, Nichols, McIntosh, Wishon and Black, testified that it was his opinion that North American could not if it attempted to do so and its attempts were resisted by the local directors, secure sufficient proxies to obtain a majority of the stock represented at a stockholders' meeting.

Mr. Black testified that he would oppose any attempt by North American to control or influence the management or policies of the petitioner with "every resource at my command" and that he was sure they would not be successful in a proxy fight because:

> "This company has a rather unique position in San Francisco and in California. It has been known for many years as a California company. The fact that the Great Western Power Company was controlled by an eastern company, the Western Power Corporation, was a great handicap to the Great Western Power Company in doing business here and particularly in competition with the Pacific Gas and Electric Company. I know something of that

feeling. I think 48 per cent of our stock is held here in California and I think without question that stock would be almost unanimously opposed against any attempt by any eastern interest, particularly any New York holding company, to get control of the company.

"Our directors are men not only who are men who own, or are able to influence very large blocks of stock directly, but they have a standing in the community and in the business world which I think would be very decisive in getting large amounts of stock proxies from holders outside of the State. I am sure that the community as a whole would be entirely on the side of the company in any such fight."

Director Fogarty, the representative of North American on the board, testified that the management or policies of petitioner were neither directly or indirectly subject to the controlling influence of North American. Nor had that company ever attempted to influence or control the management. He also said that as a practical matter it would not be possible. Mr. Freeman, the other representative, corroborated this view. Mr. Fogarty never attended a directors' meeting. This is also true of Mr. Freeman, who has never been in California.

The testimony of all of these witnesses is not contradicted.

With the exception of Fogarty and Freeman the evidence clearly indicates that the other directors, most of whom were prominent business men of San

Francisco and vicinity, were tough-fibered individuals who could not be dominated by outside influences. That was the substance of the testimony and so far as these persons are concerned this testimony admittedly is uncontradicted. In determining the question of "controlling influence" the evidence must be considered and this the Commission did not do. It was simply waved aside as of no importance whatever.

It is probably worth remarking in this connection that North American has never solicited proxies; in fact, its officers or representatives have never voted its own stock, its proxies having been sent to other stockholders. If there existed any apprehension that North American might seek proxy control, the Commission has the power to prevent North American from soliciting any proxy.

To reach the conclusion arrived at by the Commission every circumstance is viewed with a hostile eye and every instance tortured into some semblance of sinister purpose. Thus, the selection of James B. Black as president of appellant upon the unexpected death of Mr. Hockenbeamer, who had been president for many years, is pointed to as unmistakable proof of the evil influence exerted by North American, because at the time of Black's appointment he was the vice-president of North American.

It must be admitted that Black probably was as well qualified for the position as anyone anywhere; his career is altogether a notable one. His personal, professional, and administrative achievements are detailed at some length in the record, from which I

summarize briefly: He came with his parents to California at the age of twelve and has lived in San Francisco and vicinity ever since, with the exception of a short period when he resided in New York and served as vice-president of North American. He was educated in the schools of Oakland and San Francisco and at the University of California, from which he was graduated in 1913 in engineering. After graduating he was employed as a service inspector by City Electric Company, then a subsidiary of Great Western operating in San Francisco. About 1915, the properties of City Electric Company were taken over by Great Western, and Mr. Black successively engaged in sales, sales engineering, and administrative work in its San Francisco division. Later he became division manager, assistant general agent and general sales manager, and acting general manager, and in 1922 was made vice-president, general manager and a director of that company. After North American acquired control of Western Power Corporation, Mr. Black retained these positions until February, 1927, when he went to New York at the invitation of North American as one of its vice-presidents.

His selection as president of Pacific Gas and Electric Company was entirely the result of the action of the California directors of that company, many of whom were acquainted with Black's capabilities. The fact that he was a Californian, that he was familiar with some of the properties of the company, and had wide experience were deemed qualifications, and his selection met with the unanimous

approval of the board of directors. No suggestion of Mr. Black's election was made by anyone in North American; his selection was not anticipated by the officers of that company, to whom it was a surprise. There is no evidence in the record indicating that North American played any part in the choice of Black as president of the petitioner, other than to consent when the California directors asked permission to offer the position to him. When Black accepted the position he assured the California directors that he would sever all connections with North American. He has never sought or received the advice, approval, or recommendations of North American or its officers on any dividend rate, salary, refinancing, or any other pending matter. There is no difference between the information received by North American or in the relations with petitioner since Black became president and the situation existing before that time.

Not only did the Commission disregard the uncontradicted evidence substantiating that there was no "control" or "controlling influence", it also disregarded a specific and important instance revealed by the evidence which very persuasively negatived such control. At one of the meetings of the board of directors of Pacific Gas and Electric, at which the question of declaring a dividend was up for consideration, it was voted that the dividend for that year be declared at the rate of six per cent instead of the usual eight percent. The representatives of North American requested the board to

reconsider this action, but it did not accede to the request.

Notwithstanding the uncontroverted evidence to the contrary the Commission went off into the realm of speculation as to what might happen if North American should undertake to engage in a proxy fight with appellant's existing management for control, and it determined that the mere fact that there might be a strong possibility (based likewise on conjecture) that North American could prevail was itself proof of "susceptibility" to a controlling influence.

There are other instances where the Commission very frankly has interpreted the testimony of the witnesses contrary to their evidence. These interpretations, which are exaggerated into some semblance of an argument, are then designated as inferences of the Commission as to "events which might happen" but "not what actually happened". As approving these methods of the Commission quotes an excerpt from Labor Board v. Link-Belt Co., 311 U.S. 584, 597, as follows: "Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts. * * * The Board, like other expert agencies dealing with specialized fields * * * has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." But here there is no conflicting evidence to appraise, and as to weight and credibility of testimony it must be noted that the witnesses who testified contrary to the findings were outstanding men of affairs in California, and they were not con-

tradicted or impeached, and no reason appears in the record why they should be discredited.

According to the Commission petitioner was required to "demonstrate" non-control or influence by North American. The Act does not require any such mathematical extreme which excludes possibility of error. 23 CJ 9. It is sufficient if such showing is supported by substantial competent evidence which is not contradicted. Due process requires that the competent evidence adduced be fairly considered by the Commission on its merits. As was said by Justice Brandeis in speaking for the court in the Chicago Junction Case, 264 US 258, 265, "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." In Morgan v. United States, 298 US 468, 480, Chief Justice Hughes said:

> " * * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. * * * "

This court is not called upon to determine the

credibility of witnesses or to reach a conclusion upon substantially conflicting facts. Indeed, no such question is presented here, since the Commission has said in its opinion that——

> "There is almost no dispute as to the facts in this case as they are set forth in the trial examiner's report and in the briefs of both counsel. The point of issue with respect to the application under Section 2(a) (8) is rather one of statutory interpretation and in this respect we cannot agree with the conclusions reached by the trial examiner",

who found that Pacific Gas is not in fact controlled by, or subject to the controlling influence of, North American.

The Commission relies strongly on Detroit Edison Co. v. Securities and Exchange Commission, 119 F2d 730; Public Service Corporation of New Jersey v. Securities and Exchange Commission, 129 F2d 899; and Hartford Insurance Company v. Securities and Exchange Commission, 129 F2d 794. A glance at these cases will show how utterly different were the facts there presented.

In the Hartford case, 129 F2d 794, two affiliated holding companies owned 21.98 percent of the petitioner's voting stock. Not only was the president selected from one of the subsidiaries of the holding company but he frequently had advice from his former associates and secured help from the holding company's engineers in effecting changes in the petitioner's business methods. Petitioner for years submitted a preliminary draft of its annual

budget to the holding company. It obtained much of the gas that it sold to its customers through some community of interest arrangement with subsidiaries of the holding company. The cost of the gas that petitioner so purchased prior to 1940 amounted to 58 percent of all its regular operating expenses.

In the Public Service Corporation of New Jersey case, 129 F2d 899, the court pointed out that the petitioner was organized pursuant to plans submitted by the holding company which not only subscribed for 25 percent of its original stock but also underwrote part of the stock issued.

Further under contract it supplied petitioner with engineering, purchasing and general advisory service.

The president of Public Service Corporation testified that he could not have become president of the corporation against the wishes of the holding company and that no plan of the kind contemplated in its organization could have been accomplished without the affirmative approval of the holding company. See Public Service Corp. of New Jersey v. S.&E.C. Release No. 2998, Sept. 15, 1941.

There were many other instances of interlocking relationships, indeed, the record was so replete with evidence of the participation of the holding company in Public Service Corporation affairs that the Court passing on the appeal was moved to remark, 129 F2d 901 that the evidence supporting the findings was so conclusive and the contentions of petitioner were so wholly lacking in merit as to border on the frivolous.

Probably the case the Commission most relies upon is the Detroit Edison Co. v. Securities Exchange Commission, 119 F2d 730, as this case is cited in the Commission brief not fewer than nine times.

It is submitted that the facts in that case are so different from the one before us that it cannot be considered an authority to support the action of the Commission here. In the Detroit Edison case, by agreement with two existing companies, a syndicate organized by North American acquired their stock and organized the Detroit Edison Company. Its officers and directors were all designated by North American. On behalf of its syndicate North American then offered all of the stock of the corporation and agreed to finance and furnish other assistance to the new company on certain terms. By the deal the syndicate acquired three million dollars of Edison's first mortgage bonds and fifty thousand shares of its stock. The Edison then began operations. Thereupon the syndicate dissolved, and North American retained more than 10 per cent of petitioner's outstanding voting securities. The record shows that the North American dominated the board of directors through the years, and at the time of the hearing the majority of directors still had affiliations with North American. There were other intercompany relationships too extended to detail here, but referred to in the opinion and which had been discontinued not long before the hearing. From these facts it was concluded that in the light of Edison's origin and the unbroken continuity of

North American's officers, directors, and designees on its board, and its absolute domination for many years by the parent company, it was not entitled to an order granting exemption from the statute. In summing up the situation the court said:

> "The fact that the North American Company had abandoned some of the characteristics of 'controlling influence' over the petitioner at the time of the hearing, did not require the Commission to disregard prior interrelated activities. There is no showing that its latent power to resume such control had been extinguished. The relationship is such that they may enter into similar activities in the immediate future. * * *
>
> "* * * Giving due weight to the past transactions of petitioner with the North American and the continuing opportunity for the resumption of such activities and the extent of the petitioners business and the widely scattered ownership of its stock, the Commission committed no error in denying petitioner exemption from the present Act." (119 F2d at pp. 739-740.)

All the evidence in the case before us shows a complete absence of such relationships and of any control throughout the period since North American became an owner of certain stock of Pacific Gas and Electric Company because of the transfer by it of certain utility properties that it had theretofore owned.

It is significant too that those incidents of relationship which are referred to as indicative of controlling influences in practically all of the decisions which have been cited to us by the Commission are notably absent in this case as the trial examiner pointed out:

> "There have been no contracts between Applicant and North American or its subsidiaries except the contract dated March 29, 1930. (The agreement by which PGE acquired the properties of North American in California.)
>
> "Neither North American nor any of its affiliates or employees has ever performed any services with or without charge, for Applicant.
>
> "There has been no exchange of operating information between the Applicant and the admitted subsidiaries of North American.
>
> "There have never been any intercompany loans or financial transactions between the Applicant and North American or its subsidiaries.
>
> "All of Applicant's major acquisitions and construction projects have been and are decided upon, budgeted and carried out within the PG&E organization and entirely independent of North American at all stages.
>
> "North American's organization has never assisted Applicant in the preparation of any Registration Statements, nor has its Secretarial Department ever assisted Applicant in any manner.
>
> "Applicant and North American do not em-

ploy the same accountants, attorneys or engineers.

"Applicant does not employ any former officers or employees of North American, with the exception of Mr. Black, and with the exception of those who were officers or employees of acquired companies at the time of their acquisition. North American has never recommended or suggested to Applicant the employment of any person or been asked its views thereon.

"No employees of Applicant, nor of North American or of its admitted subsidiaries have ever been loaned by either to the other."

The Commission admits that the record does not reveal any past attempt by North American to interfere with its management or policies. It is likewise conceded that there is no evidence of actual control, nor, as has been shown, is there any substantial evidence from which any legally sound inference can be drawn that there ever was any effort whatsoever by North American to subject appellant to any controlling influence. Nor is there any testimony in the record from which any fair inference can be drawn that petitioner was subject to the controlling influence of North American.

Subject to a Controlling Influence

Petitioner makes the point that the Act requires some present controlling influence, not a speculative future influence, as ground for denial of an application for a declaration. The term "subject to a

controlling influence" means that approximately as of the time of the hearing the controlling influence must be actually existent even though not actively executed and that some mere potential or possible or speculative influence is not sufficient. The statute seems to imply such an interpretation. It reads "subject to a controlling influence". The word "subject" suggests some present existing quiescent controlling power that could be rendered active at will. This may also be inferred because in this very Section 2 (a) (8) it is provided that even where the Commission has acted favorably and made an order of exception this finding of the non existence of "controlling influence" may be only conditional and temporary, and "The Commission, upon its own motion or upon application, shall revoke the order * * * whenever in its judgment such modification is necessary" to effectuate the law. These provisions indicate that the Congress intended to cover a situation where there might be some "susceptibility" of such influence in the future but where none presently existed and that it did not intend that a declaration should be withheld in the absence of present active controlling influence.

From the discussion in Congress at the time the Act was under consideration and as well from the fair and ordinary meaning of the language, the phrase "subject to a controlling influence" does not mean, as the Commission found, that appellant was required to "demonstrate" that its management and policies were not "susceptible to control" by North American. "Subject to a controlling influence" is

not the equivalent of "susceptible to a controlling influence". "Susceptible" and "subject" are not interchangeable or synonymous terms. The word "susceptible" connotes an especial liability to mental and emotional impressions. Advisedly that expression was not used in the statute. But the word "subject" is used, and here it occurs in relation with "control", and in that sense it must correctly be continued as meaning under the power or dominion of another. It is synonymous with subordinate, inferior,[1] "To control" means to exercise a restraining or direct influence over; to dominate; regulate; hence to hold from action; to curb; to subject.[2] Moreover, "controlling" means the act or fact of exercising restraining influence over, which conveys the idea of a continuing process. Thus, "subject to a controlling influence", as stated in the statute, is not the same thing as "susceptibility" to a controlling influence as expressed by the Commission. One phrase refers to an actually existing state; the other might be applied to some future condition which uncertain events might possibly bring about. In considering this aspect of the matter it is important to keep in mind that under the statute as above noted the Commission is in a position to act at once if ever the susceptibility should become an actuality, even if the Commission had theretofore granted petitioner an exemption at a time when the

---

[1]See Webster's New International Dictionary.

[2]Ibid.

facts showed a lack of any actual and existing control or controlling influence.

It is also clear that the vague, artificial tests here em ployed are not sanctioned by the Act. Nor was it expected that inferences based upon inferences, or suppositions, or even possibilities, would be substituted for substantial evidence.

The facts presented to the Commission and all reasonable inferences, deductions, and conclusions to be drawn therefrom, considered in their entirety and in relation to one another, negative the findings of the Commission. The inferences which are suggested as supporting the order of the Commission are based on mere suspicion. In Labor Board v. Columbian Co., 306 US 292, 299-330, Mr. Justice Stone said:

> "* * * But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more that create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' * * *"

In vesting the Commission with the duty of ascertaining "control" or "subject to a controlling influence" of one company by another Congress did not imply that a potential facility to exercise control was sufficient to establish such controlling influence.

If this alone were sufficient the Congress would not have made provision for the exemption.

The legislative history of the Act corroborates this view. In the course of the debate on the bill, Senator Wheeler, chairman of the Committee in charge, said, with reference to the 10 percent clause (79 Cong. Rec., p. 8397):

> "That is only prima facie evidence; but even if they hold 40 percent of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company, and the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word 'control' is defined in the bill."

Again, Senator Wheeler said (79 Cong. Rec., p. 8439):

> "No, Mr. President. Let me make a distinction. The Senator from Delaware said: 'Suppose I own 10 percent of the stock of some company.' Unless I control that company I am not a holding company under the terms of this bill. The mere ownership of the 10 percent of the stock does not of itself make him a holding company, because unless he actually controls the company he is not a holding company. The Senator may overlook the factor of control. He may show that he actually does not control the company in which he owns 10 percent of stock, and if he does not have control he is not a holding company."

Neither the Commission nor the Court is warranted in departing from the purposes expressed because of any doubts that may exist as to the wisdom of following the course which Congress has marked out.

There must be some substantial evidence before the Commission that there exists such a controlling influence as would enable the holding company to bring about the evils enumerated in the Act. There is no such showing in this case.

On the contrary, the evidence affirmatively shows, as the examiner in his findings pointed out, the absence of the evils which the Act was designated to prevent.

Pacific Gas and Electric Company never had any financing, purchasing, service, management, construction or similar contracts with North American or its affiliates.

North American has never had anying whatever to do with accounting practices and rate dividends and other policies of Pacific Gas and Electric Company.

There are and have been no management, service, sales, construction or other contracts in existence, nor has there been, nor is there any evidence of control or influence exerted or attempted to be exerted over Pacific Gas and Electric Company's finances, management, and policies.

Present prospective investors in Pacific Gas and Electric securities can obtain information necessary to appraise its financial condition and earning power. It issues a comprehensive annual report and keeps

its accounts in accordance with a uniform system prescribed for gas and electric corporations by the California Railroad Commission, all of which are open to the public. During all the years North American has been a stockholder in the Pacific Gas and Electric Company, it has never had any transactions with Pacific Gas and Electric Company other than the original purchase from it in 1930.

There has been no increase or extension of North American's interest in Pacific Gas and Electric, and its relative voting power is less than it was immediately after it became a stockholder in 1930. The list enumerating the absence of many evils usually relied upon by the Commission in these cases is extended at length in the findings of the examiner, which have not been questioned. They are too numerous to detail here.

Moreover, under the Act the Commission now actually exercises over North American, as a registered holding company, such control as is itself sufficient to prevent the occurrence of any transaction or dealing between the companies as would violate the Act. While no such transactions have ever occurred and the evidence that they would not occur is uncontradicted, still the Commission by virtue of this control over North American can at once prevent them should they be proposed. Indeed, the Commission has already made an order which was affirmed by the Circuit Court of Appeals for the Second Circuit, North American Company v. S.&E.C., 133 F. 2d 148, under which North American is required to dispose of its stock in petitioner.

To sustain the Commission on the record here would require us to hold, as the court did on the first hearing, that its determination of what is necessary in the public interest is a matter within the uncontrolled discretion of the Commission. This is not the proper interpretation of the statute and counsel representing the Commission do not so contend.

The order of the Commission not being supported by substantial evidence should be set aside.

Mathews, Circuit Judge, joins in this dissent.

[Endorsed]: Dissenting Opinion and Concurrence. Filed Nov. 22, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 9918

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

DECREE.

Upon petition to review an Order of the Securities and Exchange Commission.

This cause came on to be heard on the transcript of the record upon petition to review an order of the Securities and Exchange Commission, and was duly submitted.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Securities and Exchange Commission in this cause be, and hereby is affirmed.

[Endorsed]: Filed Nov. 18, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, February 23, 1944.

Before: Wilbur, Garrecht, Denman, Mathews, Stephens and Healy, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING AND STAYING ISSUANCE OF ORDER OF COMMISSION, ETC.

Upon consideration of the petition of Pacific Gas and Electric Company, filed December 4, 1943, and within time allowed therefor by rule of court, for a rehearing of above cause, and good cause therefor appearing, It Is Ordered that said petition be, and hereby is denied.

It Is Further Ordered that the order of the Securities and Exchange Commission of September 10, 1941, denying the application of said Pacific Gas and Electric Company for an order declaring it not to be a subsidiary of the North American Company, be, and hereby is stayed until after the Supreme Court of the United States disposes of the petition for certiorari to be hereafter made by said petitioner, provided however that said petition for writ of certiorari shall be filed in the office of the clerk of the Supreme Court of the United States on or before April 10, 1944, and the decree of this Court be, and hereby is stayed accordingly.

[Title of Circuit Court of Appeals and Cause.]

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 38 of the Revised Rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five volumes, consisting of seventeen hundred seventy-seven (1777) pages, numbered from and including 1 to and including 1777, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of March, 1944.

[Seal] PAUL P. O'BRIEN,
Clerk.